BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTYNE C. HELLEBUYCK Claimant	)	
VS.	)	
HONEYWELL INTERNATIONAL Respondent	)	Docket No. **1,065,658**
AND	)	
XL INSURANCE AMERICAN, INC. Insurance Carrier	)	

ORDER

Claimant requests review of the October 14, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth Hursh. Keith Mark, of Mission, Kansas, appeared for claimant. Thomas Billam, of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated October 14, 2013, with exhibits, and all pleadings contained in the administrative file.

The ALJ found claimant failed to prove she sustained personal injury by accident arising out of and in the course of her employment and accordingly denied claimant's request for medical treatment.

ISSUES

Claimant contends the ALJ erred in finding claimant failed to sustain her burden to prove her alleged accidental injury arose out of and in the course of employment.

Respondent argues the ALJ's Order should be affirmed.

The sole issue for the Board's determination is whether claimant sustained personal injury by accident arising out of and in the course of her employment.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent performing a number of different jobs for a period exceeding 30 years. Her most recent job as a material handler required her to move boxes weighing, according to claimant, up to 40 pounds. Claimant's job description indicated the maximum lift was 30 pounds.[1]

Claimant's application for hearing alleged a series of repetitive trauma spanning her 30-year employment with respondent, culminating on May 16, 2013, causing injury to her left shoulder and back. Claimant's preliminary hearing testimony did not support the occurrence of repetitive trauma and claimant denied she sustained an injury to her left shoulder.[2] Claimant testified she sustained a single traumatic event on May 16, 2013, when she climbed up a step stool and lifted a box[3] from a shelf above her head. Claimant said she experienced stabbing pain in the left side of her lower back. At the end of her shift, claimant logged off of her computer, following which she was unable to stand up from her chair due to back pain. Claimant was scheduled to commence vacation leave the following day, May 17, 2013.

The morning following claimant's alleged injury, her back was still hurting so she sought treatment from her personal physician, Dr. Danielle Perry. Around 4:30 a.m. on that day, claimant texted her boss, Rebecca Bryant, to let her know she was going to see Dr. Perry. Claimant testified she told Dr. Perry how she injured her back at work. After her appointment with Dr. Perry, Ms. Bryant contacted claimant by telephone and was upset that claimant had gone to her own physician. Ms. Bryant directed claimant to call the plant safety people and claimant did as directed. Ms. Donna Ketchum told claimant to go to OHS CompCare. Claimant saw Dr. Robert Tenny at OHS CompCare the same day. She returned to see Dr. Tenny after her vacation.

Claimant testified:

> Q. After the first time you saw the doctors at OHS CompCare, have you followed up with them for any care or treatment?

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[1] P.H. Trans., Resp. Ex. A.

[2] *Id*. at 20.

[3] The record does not establish the weight of the box.

> A. I was in and out of his office for I want to say a week. My first day back [from vacation], you know, I worked and my back hurt and I went to HS&E,[4] and I don't know, there was back and forth with them, and they sent me back to him and then I was in and out of his office two or three times.
>
> Q. What did he ever do as far as treatment for you, if anything?
>
> A. Nothing. He sent me to someone in his office, and it was a person that if we were going to hire you at Honeywell, you would go to this person and they would make sure you could lift and stuff like that. It was that kind of, you know, a person, but they didn't give me any therapy or anything like that.[5]

Dr. Perry's records reflect an office visit on May 17, 2013, at which time claimant complained of back pain that had lasted two days.[6] Dr. Perry's May 17, 2013 chart entry contains further pertinent history: "The context of the back pain: occurred started [sic] while sitting at work. Exacerbating factors consist of standing from seated position."[7]

Records from OHS Compcare/Dr. Tenny were also admitted into evidence. Claimant was seen by Dr. Tenny initially on May 17, 2013, with complaints of back pain. The history of injury contained in the progress note for that visit is consistent with claimant's preliminary hearing testimony. Claimant was treated conservatively (ibuprophen, heat and cold, limited duty). Following an FCE, Dr. Tenny released claimant from treatment on June 18, 2013. In his progress note bearing that date, Dr. Tenny indicated he had received claimant's prior chiropractic records and concluded "at this time and with the current information available, the described work-related event is not felt to be the prevailing factor for her current symptoms."[8]

On July 18, 2013, claimant was evaluated by Dr. Michael Poppa at the request of her counsel. Included in the "history of present injury" section of Dr. Poppa's report, was the following:

> According to Ms. Hellebuyck, while in the course and scope of employment, she was performing her regular job duties when she sustained cumulative trauma to her left shoulder and back. She states she initially experienced symptoms involving her low back; [sic] which persisted and worsened through 5/16/13. She states on

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[4] This is a reference to respondent's "safety people." P.H. Trans. at 11.

[5] *Id*. at 14-15.

[6] Claimant testified the two days to which she referred were May 16-17, 2013. *Id.* at 29.

[7] *Id.*, Resp. Ex. C at 1.

[8] *Id*., Resp. Ex. F at 2.

> 5/16/13, she was standing on a step stool/kick step approximately 2 feet high removing a box from overhead when she experienced a sudden sharp pain involving her low back.[9]

Claimant missed no work since May 16, 2013, except for her vacation. At the time of the preliminary hearing, claimant was still working her regular job for respondent, but testified her low back pain continued. Claimant testified her back pain was 10 on a 10-point scale and on her best day, her back pain was 5 out of 10. In addition to low back pain, claimant also told Dr. Poppa she experienced the following symptoms:

> "I have pain and symptoms every day in my left shoulder." "When I go to sleep, it hurts." "It hurts from my left shoulder up into my neck." "I have difficulty reaching with my left arm, even in my shower." "My range of motion and strength has decreased." "I try not to use my left arm because it hurts." "I cannot sleep on my left side." "The pain is right here (lumbosacral area)." "There's no question in my mind that my shoulder (left trapezius/posterior shoulder) hurts because of my job, but it didn't happen on the exact day I hurt my back." "I received treatment from Dr. Dennis (chiropractor) about every other day for 2 weeks and then quit going."[10]

Dr. Poppa concluded claimant sustained a series of work accidents to the low back and left shoulder and that her employment was the prevailing factor in causing her injuries, medical treatment and disability.[11] It does not appear from Dr. Poppa's report that he reviewed claimant's prior chiropractic records.

The records of chiropractor Dr. Damon Dennis were admitted into evidence. The records document claimant received periodic treatment from Dr. Dennis since 2002. Some of the treatments were for neck pain, some for low back pain and others for both neck and back complaints. However, the chiropractic records do not appear to document treatment specifically for low back pain since December 2008. The OHS records reveal claimant was treated there for a lumbosacral strain in August 2004.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(a), (b) and (c) provide:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within

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[9] *Id*., Cl's Ex. 1 at 2.

[10] *Id*., Cl. Ex. 1 at 3.

[11] *Id*. at 4.

the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides in part:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates,

accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board Member finds no error in the ALJ's preliminary hearing Order and, accordingly affirms the decision. The rationale for affirming the ALJ's Order is as follows:

1. Claimant's application for hearing alleged a 30-year series of repetitive trauma due to continuous manual labor duties, culminating on May 16, 2013, when claimant was standing on a step stool removing a box from overhead. Injuries were alleged in the application to claimant's back and left shoulder. However, claimant's preliminary hearing testimony does not support a series of repetitive trauma, nor does claimant's testimony support any alleged injury to the left shoulder.

2. The first medical provider claimant saw after May 16, 2013, was her personal care physician, Dr. Perry, on May 17, 2013. Contrary to claimant's testimony, claimant did not tell Dr. Perry about her alleged work-related injury of May 16, 2013. The history provided by claimant made no reference to lifting a box or lifting overhead. Dr. Perry's history indicated claimant's symptoms commenced when sitting at work.

3. Claimant testified she was not claiming a series of injuries, nor was she alleging a left shoulder injury, in this claim. However, the physician retained by claimant, Dr. Poppa, seemed to believe otherwise. In addition to claimant's back symptoms, Dr. Poppa opined claimant "has not reached maximum improvement regarding her series of work accidents continuing through 5/16/13 while employed by Honeywell involving her left shoulder (overuse strain/repetitive trauma/posterior shoulder myofascitis/ left trapezius myofascitis/myofacial pain involving these areas) . . . ."[12]

4. Claimant commenced a period of vacation leave after she consulted Dr. Perry and Dr. Tenny on May 17, 2013. The vacation lasted about one week. Claimant did not testify her alleged injury improved or worsened on vacation. Upon her return, claimant again saw Dr. Tenny on May 28, 2013. On that date, claimant said "her back pain is currently 0/10."[13] Claimant testified her pain at the time of the preliminary hearing ranged from 5/10 to 10/10. It seems improbable that claimant's level of pain would be greater five months after the alleged injury than it was 12 days after the injury. Moreover, except for her one week vacation, claimant has lost no time from work and has continued to perform her regular job. Those facts seem inconsistent with claimant's testimony regarding her current pain level.

5. The chiropractic records of Dr. Dennis indicate claimant's low back pain is "chronic."[14] According to Dr. Poppa's report, although claimant gave a history of previous chiropractic treatment, claimant stated she only received treatment for her neck and left shoulder. Nothing was said to Dr. Poppa regarding claimant's prior chiropractic treatment for her back.[15]

CONCLUSION

This Board Member finds that claimant did not sustain her burden to prove she sustained personal injury by accident arising out of and in the course of her employment. The ALJ's preliminary hearing Order must accordingly be affirmed.

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[12] P.H. Trans., Cl. Ex. 1 at 4.

[13] *Id*., Cl. Ex. F at 11.

[14] *Id*., Resp. Ex. B at 5.

[15] *Id.,* Trans., Cl. Ex. 1 at 2.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[17]

WHEREFORE, the undersigned Board Member finds that the October 14, 2013, preliminary hearing Order entered by ALJ Kenneth Hursh is hereby affirmed.

IT IS SO ORDERED.

Dated this 30th day of January, 2014.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Kenneth Hursh, Administrative Law Judge

[16] K.S.A. 2012 Supp. 44-534a.

[17] K.S.A. 2012 Supp. 44-555c(k).